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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CURTIS JACKSON, Defendant and Appellant.	E065105 (Super.Ct.No. INF1501409) OPINION

APPEAL from the Superior Court of Riverside County. Samuel Diaz, Jr., Judge. Affirmed.

Richard Schwartzberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Barry Carlton and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Curtis Jackson's girlfriend sustained a nasty black eye. She told the police that defendant punched her in the face. At trial, however, she testified that he hit her accidentally and that she lied to the police because he was cheating on her.

After a jury trial, defendant was found guilty of inflicting corporal injury on a spouse or cohabitant. (Pen. Code, § 273.5, subd. (a).) In a bifurcated proceeding, after defendant waived a jury, the trial court found true one strike prior (Pen. Code, §§ 667, subds. (b)-(i), 1170.12) and one prior prison term enhancement (Pen. Code, § 667.5, subd. (b)). Defendant was sentenced to a total of seven years in prison, along with the usual fines, fees, and miscellaneous sentencing orders.

Defendant's sole appellate contention is that the trial court erred by failing to instruct, sua sponte, that the testimony of the prosecution's domestic violence expert about the behavior of victims was not evidence that defendant actually committed the charged crime. We will hold that, on these facts, the trial court had no sua sponte duty to give such an instruction, and, alternatively, its failure to give such an instruction was not prejudicial. Hence, we will affirm.

I

FACTUAL BACKGROUND

Defendant and his girlfriend Robbie Howard[1] lived in an apartment in Indio. Defendant was losing his eyesight, to the point where he had trouble getting around.

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[1] The victim gave her name as Robbie Howard Morgan. However, when asked if she preferred to be addressed as Ms. Howard or Ms. Morgan, she answered "Howard."

On August 18-19, 2015, at 3:51 a.m., Howard called 911. She said that defendant had "jumped on" her and that her eye was swollen. She added, "And then I went to sleep and I woke up and he had another woman in the house." She said that officers could find her, wearing a red dress, walking down the street to a particular motel.

Corporal Alex Franco responded to the apartment (not the motel). Howard was not there. Defendant said that he and Howard were in "an on-and-off relationship" and they had been arguing.

At 5:25 a.m., Howard called 911 again. She said she was back at the apartment and she wanted to press charges against defendant for hitting her in the eye.

Corporal Franco responded again. This time, he found both defendant and Howard, along with another woman. Howard smelled of alcohol. She said that, during an argument, defendant had pushed her onto a bed and "punched [her] in the face 20 times." Her right eye was bruised and swollen almost shut.[2] In Corporal Franco's opinion, such an injury was not "usually" caused by a single blow. However, he conceded that "it is possible to get a black eye from one good hard strike . . . ."

Corporal Franco asked defendant how Howard came to be injured. Defendant said "he did not know, but he did not touch her." He did not say it was an accident.

Howard, when called by the prosecution, attempted unsuccessfully to "plead the Fifth" in front of the jury. She then testified that on the night of August 18-19, 2015, she

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[2] Photos of Howard were admitted into evidence. These have not been transmitted to us. However, as the trial court later described them, it "looked pretty bad. It looked like she was coming out of a boxing ring."

was drinking. She and defendant got into an argument. As defendant was sitting down on an air mattress, he accidentally hit her in the face. It was dark, and in her opinion, defendant did not know exactly where she was. Howard did not call the police at that point. After going to sleep for a while, however, she woke up to find that defendant "had another woman in the apartment . . . ." Because she was angry, Howard called 911 and made a false report. Before trial, she contacted both the prosecution and the defense and told them the blow was an accident.

Corporal Franco, who qualified as an expert in domestic violence, testified that he had seen victims recant their statements to the police. They may do so because they are dependent on the perpetrator for support, because the perpetrator's family harasses them, or because they feel remorse.

When called by the defense, Howard testified that she and defendant were no longer in a relationship, she was not interested in getting back together with him, and she was not dependent on him for support. On cross-examination, when asked why she was not interested in getting back together with defendant, she said: "[Y]ou don't show love to anybody by hitting them. And accidents do happen. But he has issues that he needs to work out."

II

FAILURE TO GIVE A LIMITING INSTRUCTION

Defendant contends that the trial court erred by failing to give a limiting instruction, sua sponte, regarding Corporal Franco's testimony as an expert.

CALCRIM No. 850, if given in this case, would have provided:

"You have heard testimony from Corporal Franco regarding the effect of domestic violence.

"Corporal Franco's testimony about domestic violence is not evidence that the defendant committed any of the crimes charged against him.

"You may consider this evidence only in deciding whether or not Robbie Howard's conduct was not inconsistent with the conduct of someone who has been abused, and in evaluating the believability of her testimony." (CALCRIM No. 850 [with case-specific insertions and deletions].)

The trial court was not asked to give and did not give CALCRIM No. 850 or any similar instruction.

The bench notes to CALCRIM No. 850 state: "The court has a **sua sponte** duty to give this instruction if an expert testifies on intimate partner battering and its effects, previously referred to as battered women's syndrome. (See *People v. Housley* (1992) 6 Cal.App.4th 947, 958-959 . . . [sua sponte duty in context of child sexual abuse accommodation syndrome] . . . .) In *People v. Brown* (2004) 33 Cal.4th 892, 906-908 . . . , the Supreme Court held that testimony from an expert in battered women's syndrome could be admitted under Evidence Code section 801 even though there was no evidence of prior incidents of violence between the defendant and the alleged victim. The court held that the expert could testify generally about the 'cycle of violence' and the frequency of recantation by victims of domestic abuse, without testifying specifically about 'battered women's syndrome.' [Citation.] It is unclear if the court is required to give a cautionary admonition *sua sponte* when such evidence is admitted." (Judicial

Council of Cal., Crim. Jury Instns. (Oct. 2016 supp.) Bench Notes to CALCRIM No. 850, p. 556, italics added.)

As these bench notes state, In *People v. Housley*, *supra*, 6 Cal.App.4th 947, the First District, Division Two held that, when an expert testifies about child sexual abuse accommodation syndrome (CSAAS), the trial court must give a limiting instruction sua sponte "that (1) such evidence is admissible solely for the purpose of showing the victim's reactions as demonstrated by the evidence are not inconsistent with having been molested; and (2) the expert's testimony is not intended and should not be used to determine whether the victim's molestation claim is true." (*Id.* at p. 959.)

The *Housley* court explained: "[T]his type of testimony may be unusually susceptible of being misunderstood and misapplied by a jury, perhaps because the expert commonly is asked to offer an opinion on whether the victim's behavior was typical of abuse victims, an issue closely related to the ultimate question of whether abuse actually occurred. [Citations.] Such testimony, especially from one recognized as an expert in the field of child abuse, easily could be misconstrued by the jury as corroboration for the victim's claims; where the case boils down to the victim's word against the word of the accused, such evidence could unfairly tip the balance in favor of the prosecution." (*People v. Housley*, *supra*, 6 Cal.App.4th at p. 958.)

Here, however, Corporal Franco did not testify about battered woman syndrome (BWS), which would be the domestic-violence equivalent of CSAAS. (See generally *People v. Riggs* (2008) 44 Cal.4th 248, 292-294.) Thus, he did not testify that the victim's behavior *in general* was typical of domestic violence victims *in general*. He

merely testified to the much less sweeping proposition that some domestic violence victims recant their abuse claims. Once again, as the bench notes state, in *People v. Brown*, *supra*, 33 Cal.4th 892, the Supreme Court held that expert testimony that victims of domestic violence tend to recant is admissible even if it falls short of testimony about full-blown BWS. (*Id*. at pp. 906-907.) In our view, a jury is not likely to misunderstand such testimony — unlike testimony about BWS — as the expert's assertion that the alleged abuse actually occurred. Indeed, Corporal Franco conceded that an alleged victim may recant because the original claim of abuse was untrue.

Recently, in *People v. Mateo* (2016) 243 Cal.App.4th 1063, the Second District, Division Five disagreed with *Housley*; it held that there is no sua sponte duty to give a limiting instruction regarding expert testimony on CSAAS. It reasoned that *Housley* was inconsistent with Evidence Code section 355, which provides that a limiting instruction need only be given on request, and with *People v. Humphrey* (1996) 13 Cal.4th 1073, which repeatedly characterized a duty to give an instruction on BWS as existing on request. (*Mateo*, *supra*, at pp. 1073-1074.)

Obviously, if we were to follow *Mateo*, we would affirm. However, on these facts, we need not decide whether *Housley* is still good law. Instead, we follow the lead of the bench notes to CALCRIM No. 850. Thus, we hold that when an expert merely testifies that abuse victims have a tendency to recant, such testimony is not so inherently prejudicial as to require the trial court to give a limiting instruction sua sponte.

Finally, we also hold, alternatively, that the asserted error was harmless. As defendant concedes, the applicable harmless error test is whether it is reasonably

probable that the defendant would have enjoyed a more favorable outcome in the absence of the error. (*People v. Mateo*, *supra*, 243 Cal.App.4th at p. 1074; *People v. Housley*, *supra*, 6 Cal.App.4th at p. 959; see generally *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Corporal Franco's expert opinion did not particularly hurt defendant. He did not testify that all or even most domestic violence victims recant, but only that "I have seen it happen." On cross-examination, when asked in how many cases he had seen a victim recant, he remembered only two, "out of [the] hundreds of domestic violence cases that [he] ha[d] done." Moreover, in one of those, the victim did not actually recant; rather, she "came to sentencing and minimized the injuries . . . ." As mentioned, he conceded that an alleged victim may recant because the original accusation was false and the recantation is true. Finally, he testified that a victim may recant because the victim is financially dependent on the perpetrator or because the perpetrator's family harasses the victim. On cross-examination, however, he admitted that he had no evidence that Howard was financially dependent on defendant or that she had been threatened by defendant or his family.

On the other hand, the evidence that defendant hit Howard intentionally, while not overwhelming, was far stronger than defendant makes it out to be. Apparently Howard's eye, as shown in the photos, was severely bruised and swollen. In Corporal Franco's uncontradicted opinion, it was unlikely that a single blow could have caused this injury. When Corporal Franco asked defendant how it occurred, defendant did not say that he inflicted it accidentally; instead, he denied so much as "touch[ing]" Howard. Howard

claimed that she was testifying so defendant would not go to prison for something he did not do; before that, however, she tried to take the Fifth, and when forced to testify, she admitted that "[she] would have rather this case proceeded without [her] . . . ." And in a revealing slip, when asked why she did not want to get back together with defendant, she said, "[Y]ou don't show love to anybody by hitting them."

In sum, then, the trial court did not err by failing to give CALCRIM No. 850 or a similar instruction, and that its failure to do so, if error at all, was harmless.

III

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

MILLER
J.

CODRINGTON
J.